Supreme Court, U.S.
FILED
AUG 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

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No. 90-51

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AETNA LIFE INSURANCE COMPANY, a Connecticut corporation, doing business in Florida, and SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY,

Petitioners,

v.

KENNETH KANE, individually and as Guardian, next friend and on behalf of JONATHAN ANDREW KANE, a minor,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Suggestion for Rehearing In Banc filed by Petitioners tolled the 90-day jurisdictional time period for filing the Petition for Writ of Certiorari.
2. Whether the Circuit Court of Appeals' decision in *Kane v. Aetna*, 893 F.2d 1283 (11th Cir. 1990), conflicts with decisions of this Court or other circuits.
3. Whether federal courts have the authority to apply the federal common law doctrine of equitable estoppel to enforce an interpretation of ambiguous provisions of a benefit plan in an action under the Employee Retirement Income Security Act of 1974, 29 U.S.C.S. §§ 1001-1461 (1990) ("ERISA").

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondent, Kenneth Kane, individually and as Guardian, next friend and on behalf of Jonathan Andrew Kane, respectfully requests this Court to deny the Petition for Writ of Certiorari seeking review of the decision of the Circuit Court of Appeals dated February 7, 1990. That opinion is reported at 893 F.2d 1283 (11th Cir. 1990).

JURISDICTION

Respondent adopts the statement on "Jurisdiction" as set forth in the Petition for Writ of Certiorari at 2, but denies that the jurisdiction of this Court has been properly invoked and further urges this Court not to exercise its discretionary powers to review this matter. Respondent adds that the Petition for Writ of Certiorari was not filed until July 5, 1990, 148 days after the judgment of the Circuit Court of Appeals was entered, and was not received by Respondent's counsel until July 16, 1990.

STATUTORY PROVISIONS INVOLVED

Respondent sets forth the following pertinent statutes and Rules and agrees that 29 U.S.C.S. §§ 1001(b), (c); 1003(a); 1002 *sic* [1102]; 1132; 1144, set forth in the Petition for Writ of Certiorari, are also relevant.

1. 28 U.S.C.S. § 2101 (1990). Supreme Court; time for appeal or certiorari; docketing; stay

   * * * *

   (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

2. 29 U.S.C.S. § 1022(a) (1990). Plan description and summary plan description

   (a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 104(b) [29 U.S.C.S. § 1024(b)] of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate

and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the term of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 104 (b)(1) [29 U.S.C.S. 1024(b)(1)] of this title.

3. 29 U.S.C.S. § 1104(a)(1) (1990). Fiduciary duties

(a) Prudent man standard of care (1) Subject to sections 403(c) and (d) [29 U.S.C.S. §§ 1103(c) and (d)], 4042 [29 U.S.C.S. § 1342], and 4044 [29 U.S.C.S. § 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; . . .

4. 29 U.S.C.S. § 1144(c)(1) (1990). Other laws

* * * *

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

5. Sup. Ct. R. 13. Review on Certiorari; Time for Petitioning

.1. A petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort, a United States court of appeals, or the United States Court of Military Appeals shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the

entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court which is subject to discretionary review by the state court of last resort shall be deemed in time when it is filed with the Clerk within 90 days after the entry of the order denying discretionary review.

.2. A Justice of this Court, for good cause shown, may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days.

.3. The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

.4. The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.

* * * *

.6. An application to extend the time to file a petition for a writ of certiorari must set out the grounds on which the jurisdiction of this Court is invoked, must identify the judgment sought to be reviewed and have appended thereto a copy of the opinion and any order respecting, and must set forth with specificity the reasons why the granting of an extension of time is thought justified. For the time and manner of presenting the application, see Rules 21, 22 and 30. An application to extend the time to file a petition for a writ of certiorari is not favored.

6. Fed. R. App. P. 35. Determination of causes by the court in banc.

(a) *When hearing or rehearing in banc will be ordered.*—A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) *Suggestion of a party for hearing or rehearing in banc.*—a party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

(c) *Time for suggestion of a party for a hearing or rehearing in banc; suggestion does not stay mandate.* —If a party desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

7. 11th Cir. R. 35-6. *Form of Suggestion.* A suggestion of in banc consideration shall be bound in a white

cover which is clearly labeled with the title "Suggestion of Rehearing (or Hearing) in Banc". A suggestion of rehearing in banc will also be treated as a petition for rehearing before the original panel. A petition for rehearing will not be treated as a suggestion of rehearing in banc. A suggestion of in banc consideration shall contain the following items in this sequence:

(a) a cover page as required by 11th Cir. R. 28-2(a);

(b) a certificate of interested persons as required by 11th Cir. R. 28-2(b);

(c) where the party suggesting in banc consideration is represented by counsel, one or both of the following statements of counsel as applicable:

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: [cite specifically the case or cases]

I express a brief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance. [set forth each question in one sentence]

/s/ _____
Attorney of Record for

(d) table of contents and citations;

(e) statement of the issue(s) asserted to merit in banc consideration;

(f) statement of the course of proceedings and disposition of the case;

(g) statement of any facts necessary to argument of the issues;

(h) argument and authorities. These shall concern only the issues and shall address specifically not only their merit but why they are contended to be worthy of in banc consideration;

(i) conclusion;

(j) certificate of service.

8. Fed. R. App. P. 40(a). Petition for rehearing

(a) *Time for filing; content; answer; action by court if granted.*—A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehened and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

9. Fed. R. App. P. 47. Rules by courts of appeals

Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the court of appeals may regulate their practice in any manner not inconsistent with these rules. Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.

10. 11th Cir. R. 41-1(d). *Stay or Recall of Mandate.*

* * * *

(d) Because the timely filing of a petition for rehearing will stay the mandate under FRAP 41, and because a suggestion of rehearing in banc is also treated as a petition for a panel rehearing under 11th Cir. R. 35-6, upon timely filing of a petition for panel rehearing or suggestion of rehearing in banc, the mandate is stayed until disposition thereof unless otherwise ordered by the court.

STATEMENT OF THE CASE

Kenneth Kane ("Respondent") works for BellSouth Corporation ("BellSouth") as a repair technician and is covered under the company's medical expense plan (the "Medical Plan"). (R. 28, Depo. of Kane at 8.) BellSouth furnished Respondent with a written summary plan description (the "Summary Plan") which described the requirements and benefits of the Medical Plan in a general manner, giving employees only very basic information concerning the Medical Plan. (R. 28, Depo. of Kane at 20, 30-31.)

Respondent and his wife were considering adopting a second child and learned of a newborn at Plantation General Hospital (the "Hospital") who might be available for adoption. (R. 28, Depo. of Mrs. Kane at 8-10).

The newborn ("Jonathan") had been put up for adoption by his natural mother. Before he was born, a couple had agreed to adopt Jonathan, but changed their minds upon learning that he was born with serious medical disabilities.

Jonathan was born prematurely. He was afflicted with Hyalin Membrane Disease. He was also being treated for meningitis and serious breathing troubles. (R. 28, Depo. of Kane at 43.) Although Respondent and his wife wanted to adopt Jonathan after first visiting him in the Hospital, they were uncertain whether they would

be able to do so because of their inability to afford the substantial medical bills Jonathan had amassed and his anticipated future medical bills. (R. 28, Depo. of Kane at 43, 64-65.)

Thus, Respondent and his wife sought to ascertain whether Jonathan's birth and medical expenses would be covered under the Medical Plan. (R. 28, Depo. of Mrs. Kane at 11-13.) The Summary Plan states that adopted children, including those who are in the formal legal process of adoption, are covered under the Plan. (Appendix to Respondent's Initial Brief on Appeal, Item No. 3, at 5.) The Plan does not further define the term "adoption."[1] Respondent's wife called the toll free number listed on the inside cover of the Summary Plan under the heading "Telephone Inquiries" and spoke with Aetna Life Insurance Company's ("Aetna's") office. (R. 28, Depo. of Mrs. Kane at 8, 11-14; Appendix to Respondent's Initial Brief on Appeal, Item No. 3.)

Aetna's office is staffed by knowledgeable and trained representatives, employed for the sole purpose of verifying coverage and eligibility under the Medical Plan pursuant to Aetna's agreement with BellSouth. Aetna is aware that hospitals and beneficiaries of the Medical Plan rely on verbal confirmations of coverage or eligibility on a daily basis, making sometimes critical medical decisions based on the information they receive. (R. 38, Depo. of Knight at 4-8, 12-13, 22; R. 36, Depo. of Brock at 12-16.) In her deposition, Respondent's wife related the conversation as follows:

> I told here [Aetna's staff representative] we were interested in a baby that was up for adoption. It was in the hospital. And we wanted to know if that

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[1] Respondent has consistently maintained that Jonathan was in the formal legal process of adoption at his birth. Pursuant to Chapter 63, Florida Statutes, the natural mother's consent putting a child up for adoption is irrevocable. Jonathan's natural mother had formally agreed to put him up for adoption prior to birth and executed the consent at birth.

> child would be covered. And she said yes, there was no question of it, you know, that any adopted child would be covered under our policy. And I told her, "it's just as simple as that?" And she said, "Yes, as soon as the adoption proceedings had started that child would be legally covered by our policy." (R. 28, Depo. of Mrs. Kane at 18-19.)

Maria Almendros, an insurance verifier for the Hospital, testified that she also telephoned Aetna's office to confirm that Jonathan was covered under Respondent's Medical Plan. Ms. Almendros stated that she spoke with Lori Knight, one of Aetna's trained representatives, who verified coverage for Jonathan. (R. 28, Depo. of Almendros at 5-11, 14-16, 20, 21, 27, 28.) No Aetna representative denied that coverage was verified.

Relying upon Petitioners' interpretation of the Plan and assurances that Jonathan's medical expenses would be paid, Respondent and his wife adopted Jonathan. (R. 28, Depo. of Kane at 64-65). However, much to their surprise, when they filed for Jonathan's medical expenses, their entire claim was denied. (R. 36, Depo. of Brock at 26.)

In spite of its assurances of coverage, Aetna attempted to justify the subsequent denial by claiming that medical expenses for a continuous hospital stay were not covered where hospitalization began prior to the effective date of coverage. Aetna maintained that adoption proceedings had not begun until after Jonathan was in the hospital. Respondent has consistently maintained that the denial of benefits was wrongful. Aetna knew Jonathan was already in the hospital when Respondent and his wife were deciding whether to adopt him. Further, Respondent has always maintained that Jonathan was already in the process of adoption when he was born. *See* n. 1, *supra*.

Respondent filed this action seeking recovery of unpaid benefits, alleging equitable estoppel and wrongful denial

of benefits. The District Court granted Petitioners' Motion for Summary Judgment and dismissed Respondent's claims holding that ERISA preempts all state common law causes of action relating to employee benefit plans. Respondent appealed the dismissal.

The Circuit Court reversed, holding that Federal Courts possess authority to develop a body of *federal* common law under ERISA and that no modification or amendment to the plan was involved, but rather an interpretation of ambiguous provisions. The Court stated that the:

> [f]ederal common law of equitable estoppel may be applied in this case because the representations made by Aetna to Mrs. Kane [Respondent's wife] and the hospital were *interpretations* of the Plan, and not modifications. (Emphasis in original.)[2]

Kane v. Aetna, 893 F.2d 1283, 1285 (11th Cir. 1990).

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari was filed 148 days after final judgment was entered by the Court of Appeals. Although Petitioners filed a Suggestion for Rehearing In Banc, that filing does not toll the time for filing a petition for writ of certiorari. Therefore, the Petition for Writ of Certiorari is untimely and must be dismissed.

The Circuit Court of Appeals held that federal courts have the authority to apply the federal doctrine of equi-

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[2] The Court of Appeals did not reach Respondent's claim for wrongful denial of benefits because it held that Respondent was entitled to recovery on the basis of equitable estoppel. Respondent has not abandoned its claim for wrongful denial. A claim that benefits were wrongfully denied in a suit for recovery of unpaid benefits is precisely the type of claim contemplated by 29 U.S.C.S. § 1132. *See, Firestone Tire and Rubber Co. v. Bruch*, —— U.S. ——, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989).

table estoppel in an ERISA action to enforce an interpretation of ambiguous provisions of a benefit plan. Petitioners have failed to show that the decision of the Circuit Court of Appeals conflicts with decisions of this Court or decisions of other federal appeals courts. Cases cited by Petitioners do not address the *federal* common law of equitable estoppel and do not involve an interpretation of ambiguous plan provisions, but rather, plan modifications or amendments. Thus, resolution of the issues raised by the decision of the Circuit Court of Appeals will not resolve a conflict and the Petition for Writ of Certiorari should be denied.

Based solely on federal law, the decision of the Circuit Court of Appeals does no violence to exclusive federal regulation of employee benefit plans. This Court and the legislature have anticipated the development of federal common law in ERISA actions. Application of the federal doctrine of equitable estoppel is appropriate in this action and does not conflict with provisions of ERISA. The Circuit Court of Appeals expressly premised its holding on the language of the plan itself. *Kane*, at 1286. Moreover, the *Kane* decision does not undermine the integrity of the plan. *Id.*

REASONS FOR DENYING THE WRIT

THE PETITION FOR WRIT OF CERTIORARI IS UNTIMELY AND MUST BE DENIED.

The judgment of the Court of Appeals was entered on February 7, 1990. On February 27, 1990, Petitioners filed a Suggestion for Rehearing In Banc. On April 6, 1990, the Court of Appeals denied the Suggestion.

On July 5, 1990, ninety days after the Suggestion for Rehearing was denied and 148 days after the entry of the Court of Appeals' judgment, Petitioners filed a Petition for Writ of Certiorari.

To invoke the jurisdiction of this Court to review a decision of a federal appeals court, a petition for writ of

certiorari must be filed within ninety days from the date judgment is rendered. 28 U.S.C.S. § 2101; Sup. Ct. R. 13. Failure to file the petition within the ninety-day period is fatal. *Parker v. Illinois*, 333 U.S. 571 (1948), *reh. den.*; *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923); *Rust Land & Lumber Co. v. Jackson*, 250 U.S. 71 (1919).

A timely petition for rehearing tolls the start of the time period in which a petition for writ of certiorari must be filed until rehearing is denied or a new judgment is entered on the rehearing. Sup. Ct. R. 13.4; *Department of Banking v. Pink*, 317 U.S. 264 (1942).

However, a suggestion for rehearing in banc does not toll this time period. Supreme Court Rule 13, entitled "Review on Certiorari; Time for Petitioning" expressly states that:

> .4. The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate . . . . However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties . . . runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. *A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.* (Emphasis added.)

Sup. Ct. R. 13.4.

Fundamental differences between a petition for rehearing and a suggestion for rehearing exist. As explained recently by this Court,

> A petition for rehearing is designed to bring to the panel's attention points of law or fact that it may have overlooked. Fed. Rule App. Proc. 40(a). The panel is required to consider the contentions in the

> petition for rehearing, if only to reject them. Rehearing in banc is a discretionary procedure employed only to address questions of exceptional importance or to maintain uniformity among Circuit decisions. Fed. Rule App. Proc. 35(a). As the Reporter for the Advisory Committee drafting the Rules has observed: "[A] party who desires a hearing or rehearing in banc may 'suggest' the appropriateness of such a hearing. . . . The term 'suggest' was deliberately chosen to make it clear that a party's sole entitlement is to direct the attention of the court to the desirability of in banc consideration. A suggestion is neither a petition nor a motion; consequently, it requires no disposition by the court." Ward, The Federal Rules of Appellate Procedure, 28 Federal B.J. 100, 110-111 (1968); *see also Moody v. Albemarle Paper Co.*, 417 U.S. 622, 625 (1974) (*per curiam*); *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 5 (1963); *Western Pacific R. Corp. v. Western Pacific R. Co.*, 345 U.S. 247, 258-259 (1953). Consequently, Rule 35(c) specifically provides that the filing of a suggestion for rehearing in banc, unlike a petition for rehearing, "shall not affect the finality of the judgment of the court of appeals or stay of the issuance of the mandate."

Missouri v. Jenkins, —— U.S. ——, 58 U.S.L.W 4480, n. 14 (U.S. April 18, 1990).

The *Jenkins* case is highly instructive on the issue of the untimeliness of the Petition for Writ of Certiorari in this action. There, three appellants filed documents which were styled as a ". . . Petition for Rehearing En Banc", a "Petition for Rehearing En Banc with Suggestions in Support", and a "Petition . . . for Rehearing by Court En Banc".

This Court noted that, technically, there is no provision for the filing of a "Petition for Rehearing En Banc" and expressly determined that:

> If the filing was no more than a suggestion for rehearing in banc, as respondents insist, the Petition

> for Certiorari was untimely. But if, as the State argues, its paper qualified for treatment as a petition for rehearing within the meaning of Rule 40 as well as a suggestion for rehearing in banc under Rule 35, the 90-day period for seeking certiorari began on October 14, 1988, and the State's Petition for Certiorari was timely filed.

Id. at 4483. This determination was controlling.

Because it was unclear whether the documents filed in *Jenkins* were petitions for rehearing, suggestions for rehearing in banc, or both, the Court held that the documents were *qualified* for treatment as petitions for rehearing. Only because the Court of Appeals had in fact treated the documents as petitions for rehearing, did the *Jenkins* Court find that the time for filing a petition for writ of certiorari was tolled.

Significantly, in both form and substance, the document filed by Petitioners in this action is a Suggestion for Rehearing In Banc.

The document filed by Petitioners was styled as a "Suggestion for Rehearing In Banc" (P.C., at 14a), and the sole relief requested was for the full court to take jurisdiction of the suggestion to reverse the panel decision. (P.C., at 16a, 27a.) The Suggestion states that consideration by the full court is "necessary to maintain uniformity of its decisions" and that the proceeding involves a "question of exceptional importance." (P.C., at 16a.) These are the considerations expressly required by Federal Rule of Appellate Procedure 35(a) and Eleventh Circuit Rule 35-3 to obtain a full rehearing in banc. Petioners' Suggestion for Rehearing followed the exact format required by Eleventh Circuit Rule 35-6 and contained the certificate and statements required by that rule. (P.C., at 15a, 16a.) Nowhere in the document does the phrase "petition for rehearing" appear. Even the Petition for Writ of Certiorari concedes the document was a Suggestion for Rehearing In Banc. (P.C., at 2.)

Because the document which Petitioners filed was no more than a suggestion for rehearing in banc, it is not qualified for treatment as a petition for rehearing and cannot toll the time for filing a petition for writ of certiorari.

That the Eleventh Circuit local practice may be to treat suggestions for rehearing in banc as petitions for rehearing for purposes of delaying issuance of the mandate or otherwise is irrelevant.

Respondent notes that Eleventh Circuit Rule 35-6 provides that "A suggestion of rehearing in banc will also be treated as a petition for rehearing before the original panel. . . ." and that Eleventh Circuit Rule 41-1(d) states that "because a suggestion of rehearing in banc is also treated as a petition for a panel rehearing under Eleventh Circuit Rule 35-6, upon timely filing of a petition for panel rehearing or suggestion of rehearing in banc, the mandate is stayed until disposition thereof unless otherwise ordered by the court." However, nowhere do the local rules of the Eleventh Circuit state that filing a suggestion for rehearing in banc *tolls* the period for filing a petition for writ of certiorari. In fact, for purposes of computing the time period to file a petition for writ of certiorari, the local rules do not in any manner purport to treat a suggestion for rehearing in banc as a petition for rehearing.

Moreover, the local practice of the Eleventh Circuit cannot alter Supreme Court and federal appellate practice, which clearly state that a suggestion for rehearing in banc does not affect the finality of the judgment and does not toll the time for filing a petition for writ of certiorari. Sup. Ct. R. 13; Fed. R. App. P. 35(c). Federal appeals courts are only empowered to enact rules regulating their local practice to the extent that such rules are consistent with the Federal Rules of Appellate Procedure. Fed. R. App. P. 47. Any local rule or practice which, for purposes of computing the time period for

filing a petition for writ of certiorari, purports to treat a suggestion for rehearing in banc as a petition for rehearing, would be directly contrary to the express mandates of Supreme Court Rule 13.4 and Federal Rule of Appellate Procedure 35(c), and thus, would be invalid.

THE DECISION OF THE CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUIT COURTS OF APPEAL.

The *Kane* decision is based solely on federal law and therefore does not offend the notion that federal regulation of employee benefit plans is exclusively a federal concern. Because the holding in *Kane* is expressly based upon an interpretation of ambiguous provisions of the Medical Plan as written, application of the federal common law of equitable estoppel is not precluded as being contrary to any issue expressly addressed by ERISA. *Kane v. Aetna*, 893 F.2d 1283, 1285-86 (1990). As the Circuit Court of Appeals found, because a modification or amendment to the Plan was not involved, the fiscal integrity of the Plan is not undermined and the ability of employees and beneficiaries to rely on the terms of such plans will remain unaffected. *Id.* at 1286; *see also, Black v. TIC Inv. Corp.*, 900 F.2d 112, 115 (7th Cir. 1990). Petitioners are free to amend the Plan to eliminate ambiguity of its written terms.

A. *The holding of the Circuit Court of Appeals does not conflict with decisions of this Court.* ERISA preempts state laws which relate to employee benefit plans. However, Petitioners have cited no decision of this Court which holds that the doctrine of equitable estoppel may never be applied to an ERISA action as part of federal common law. The legislature and this Court have in fact anticipated the development of a body of federal common law to protect beneficiaries of ERISA plans:

> "[i]t is also intended that a body of Federal substantive law will be developed by the courts to deal

> with issues involving rights and obligations under private welfare and pension plans."

Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 56 (1987) (quoting remarks of Sen. Javits, 120 Cong. Rec. at 29942).

Petitioners rely heavily on the fact that ERISA contains six integrated civil enforcement provisions which were intended to be exclusive remedies, 29 U.S.C.S. § 1132. They reason that permitting recovery on the basis of the federal common law of equitable estoppel would expand these enforcement provisions.

What Petitioners fail to recognize is that the enforcement provisions expressly authorize civil actions to be brought by a participant or beneficiary to recover benefits or enforce rights under the plan or to obtain other appropriate "equitable relief." 29 U.S.C.S. §§ 1132(a)(1)(B), (3)(B).[3] Application of the doctrine of equitable estoppel to a suit to recover benefits does not expand the civil enforcement provisions of ERISA by, for example, permitting a beneficiary to institute an action to collect civil penalties or enjoin an act or practice which violates ERISA. *See*, 29 U.S.C.S. §§ 1132(a)(5), (a)(6). To relegate a beneficiary in Respondent's position to instituting a declaratory judgment action before deciding whether to proceed with an adoption as Petitioners suggest is burdensome and contrary to express Congressional intent.

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[3] *See Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987) (holding that Respondent's claims for breach of contract, reimplementation of benefits and compensatory damages for money owed stated a cause of action under the civil enforcement provisions of ERISA: "Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court. Since we have found Taylor's cause of action to be within the scope of § 502(a), we must honor that intent . . ."

B. *The holding of the Circuit Court of Appeals does not conflict with its own earlier decisions.* Petitioners complain that *Kane* conflicts with *Nachwalter v. Christie*, 805 F.2d 956 (11th Cir. 1986). To the contrary, the Circuit Court harmonized and explained *Nachwalter*, stating that although Respondent's *state* common law cause of action for equitable estoppel was preempted by ERISA:

> Federal courts possess the authority, however, to develop a body of federal common law to govern issues in ERISA actions not covered by the act itself. *Pilot Life*, 481 U.S. at 56, 107 S.Ct. at 1557. This court has held that the federal common law of equitable estoppel is not available to plaintiffs in cases involving oral amendments to or modifications of employee plans governed by ERISA because ERISA specifically addresses these issues. *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986) (construing 29 U.S.C. § 1102(a)(1), which requires that employee benefit plans must be "established and maintained" pursuant to a written instrument"). The district court found that Aetna's representations to Mrs. Kane and the hospital insurance verifier constituted oral modifications of the Plan. Relying on *Nachwalter*, the court held that all claims based on these modifications were precluded under ERISA.
>
> Appellant asserts that the federal common law of equitable estoppel may be applied in this case because the representations made by Aetna to Mrs. Kane and the hospital were *interpretations* of the Plan, and not modifications. We agree.
>
> * * * *
>
> The provisions of the Plan at issue here are ambiguous: reasonable persons could disagree as to their meaning and effect.
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> * * * *
>
> These provisions clearly are subject to varying interpretations.

* * * *

Given this ambiguity, we are of the opinion that these events involved an oral interpretation of the Plan, not an amendment or modification.

* * * *

Because the issue before us involves an oral interpretation of an ERISA plan, the *Nachwalter* decision, which is limited to oral amendments and modifications, is not controlling. *See* 805 F.2d at 960. The federal common law of equitable estoppel may be applied to the facts of this case. *See* 2 M. Rhodes, *Couch Cyclopedia of Insurance Law* § 15:54 (Rev. ed. 1984) ("An insurer, however, may be estopped in reference to the meaning of a particular term in one of its contracts by its own interpretation of that term"). In reaching this conclusion, we are unpersuaded by appellees' argument that the application of the federal common law of equitable estoppel in this case would be contrary to the underlying policy of ERISA. Requiring appellees to adhere to the oral interpretations of the Plan's provisions made by Aetna to Southern Bell employees will not undermine the integrity of the Plan. Stating the question more broadly, use of the law of equitable estoppel to enforce oral interpretations of employee benefit plans will not affect the ability of employees and beneficiaries to rely on the written terms of such plans. (Emphasis in original.)

Kane, at 1285-86.

The Court's distinction is well founded. Black's Law Dictionary defines "interpret" to mean:

> To *construe*; to *seek out the meaning of language*; to translate orally from one tongue to another.

In contrast, the term "modify" is defined to mean:

> To *alter*; to *change* in incidental or subordinate features; *enlarge; extend; amend;* limit, reduce. Such alteration or change may be characterized, in quantitative sense, as either an increase or decrease.

Johnson v. Three Bays Properties No. 2, Inc., Fla. App., 159 So.2d 924, 926.

Black's Law Dictionary 733, 905 (5th ed. 1979) (Emphasis added).

Moreover, a modification or amendment to a plan alters coverage in all future cases and admittedly must be in writing to be enforceable. 29 U.S.C.S. § 1102(a)(1), (a)(3); *Nachwalter*, 805 F.2d at 960. In contrast, to simply hold that Petitioners are estopped from disclaiming liability in a specific instance for their own *interpretation* of an ambiguity in the Plan will not alter coverage in future cases and does not modify the Plan. Petitioners are free to remedy the ambiguity by drafting the Plan more precisely.

C. *The decision of the Court of Appeals does not conflict with decisions of other circuit courts.* Petitioners have cited no decision which precludes application of the federal doctrine of equitable estoppel in an ERISA action to enforce an express interpretation of ambiguous provisions of a medical benefit plan, and Respondent is aware of none.

There is discord among federal appeals courts on the issue of whether the doctrine of equitable estoppel is applicable to an ERISA action. However, redetermination of the issues raised by the *Kane* decision will not resolve that conflict.

Kane is the first Court of Appeals decision of which Respondent is aware, expressly holding that the *federal* common law doctrine of equitable estoppel can be applied to an action to recover unpaid benefits. Moreover, *Kane* is based upon a limited set of factual circumstances: a private welfare plan's express interpretation of ambiguous provisions of a medical plan and affirmative representations of coverage. No case cited by Petitioners involves these specialized circumstances. Thus, *Kane* does not conflict with decisions of any other federal appellate court.

(i) *Ninth Circuit Authority*

Although Ninth Circuit authority is in a state of flux, no cited Ninth Circuit decision holds that the application of equitable estoppel to an ERISA action is precluded under all circumstances. Moreover, no cited case involves the interpretation of an ambiguous provision of an employee welfare benefit plan.

Cann v. Carpenters Pension Trust, 662 F. Supp. 501 (C.D. Cal. 1987) sets forth a considered analysis of Ninth Circuit authority.[4] Mr. Cann was informed by his pension plan that he had lost his eligibility due to a break in service. In reliance on the asserted loss, he did nothing further to maintain eligibility under the plan. Mr. Cann contested the plan's decision and ultimately obtained a reversal of its interpretation of ineligibility. Noting that the doctrine of estoppel was "a weapon in this court's arsenal of inherent equitable powers," the *Cann* court held that the plan was estopped from asserting that Mr. Cann was ineligible for benefits due to his failure to maintain eligibility subsequent to the plan's erroneous interpretation that eligibility had been lost due to the break in service. *Id.* at 505.

Reviewing relevant Ninth Circuit authority, the *Cann* court reconciled the decisions into three groups:

> In the first group of cases, the courts appear to recognize the applicability of estoppel but refuse to apply it because the courts would be compelling a trust to commit an illegal act [by compelling payment of benefits where the *unambiguous* written terms of the plan expressly and directly forbid it]. A second group of cases also recognizes the estoppel doctrine, but in those cases the courts found that the

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[4] *Davidian v. Southern California Meat Cutters Union and Food Employees Ben. Fund*, 859 F.2d 134, 136, n.3 (9th Cir. 1988), specifically left the analysis in *Cann* undisturbed. Moreover, *Davidian's* holding is fully consistent with the analysis in *Cann*.

> fact patterns would not support application of the doctrine. Finally, in a third group of cases, the courts appear to take a broad view of that estoppel can never be used in reviewing pension plan decisions. Accepting the view of this third group of cases would require this court to ignore most of the Ninth Circuit Authority in this area.

Id. at 505.[5]

Each one of the Ninth Circuit decisions cited by Petitioners fit squarely within the *Cann* court's analysis. Three of the cases cited by Petitioners hold that estoppel cannot mandate payment in direct contradiction of the plan's express terms.[6] Unlike *Kane*, no interpretation of ambiguous provisions was involved in those three cases. Two cited cases make no mention or reference to ERISA and are therefore similarly not applicable to the issues raised in this action.[7] Another case holds only that no *state* common law cause of action was available under ERISA.[8] All but one of the cases[9] apparently involved collectively bargained pension plans.[10] In short, Ninth Circuit authority does not conflict with *Kane*.

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[5] *See also, Oates v. Teamster Affiliates Pension Plan*, 482 F. Supp. 481, 487-88 (D.D.C. 1979).

[6] *Hansen v. Western Greyhound Retirement Plan*, 859 F.2d 779, 781, n.1 (9th Cir. 1988); *Davidian v. Southern California Meat Cutters Union and Food Employees Ben. Fund*, 859 F.2d 134, 136, n.3 (9th Cir. 1988); *Aitken v. IP & GCU-Employer Retirement Fund*, 604 F.2d 1261, 1265 (9th Cir. 1979). These cases did not involve estoppel claims based on express representations as in this action and thus estoppel was held inapplicable.

[7] *Thurber v. Western Conference of Teamsters Pension Plan*, 542 F.2d 1106 (9th Cir. 1976); *Aitken*, 604 F.2d 1261.

[8] *Moore v. Provident Life and Accident Insurance Co.*, 786 F.2d 922, 928 (9th Cir. 1986).

[9] *Moore*, 786 F.2d 922.

[10] Although 29 U.S.C.S. § 186(c)(5) and 29 U.S.C.S. § 1102(a)(1) are similar in that both require benefit plans to be "established and

(ii) *Other Authority*

Other authority cited by Petitioners for the proposition that *Kane* conflicts with federal appellate decisions in other circuits is similarly inapposite.

The Tenth Circuit decision in *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262 (10th Cir. 1988), does not conflict with *Kane* because Straub brought suit against his employer only and did not assert a claim against the plan under ERISA or otherwise. *Id.* at 1263. *Straub* is also inapposite because it involved a *modification* to a plan and not an interpretation of an ambiguous plan provision. *Id.* at 1265. Additionally, *Straub* involved a pension plan and the alleged liability was premised on an omission rather than an affirmative representation. *Id.* at 1263.

The Second Circuit decision in *Moore v. Metropolitan Life Insurance Co.*, 856 F.2d 488 (2d Cir. 1988), does not conflict with *Kane* because that court held only that, "[a]n ERISA welfare plan is not subject to *amendment* as a result of informal [written] communications between an employer and plan beneficiaries." (Emphasis added.) *Id.* at 492. Moreover, no interpretation of an ambiguous plan provision was rendered. *Moore* involved an omission. *Id.* at 491.

Similarly, The Fifth Circuit decision in *Degan v. Ford Motor Co.*, 869 F.2d 889 (5th Cir. 1989), is not in conflict with *Kane* because the *Degan* court held only that "ERISA precludes oral *modifications* to benefit plans. . ." (Emphasis added.) *Id.* at 895. Significantly, the *Degan* court relied on *Straub* and *Nachwalter*, both of which in-

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maintained pursuant to a written instrument", the intent of the Legislature in drafting them was not the same and does not mandate similar treatment in all circumstances. Further, pension plans are more heavily regulated than private medical welfare plans. *Moore v. Metropolitan Life Insurance Co.*, 856 F.2d 488, 491 (2d Cir. 1988).

volved amendments or modifications to the plans involved and not interpretations of ambiguous plan provisions. *Id.* *Degan* also involved a collectively bargained pension plan. *Id.* at 891. The Fifth Circuit's decision in *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989), also relies on *Nachwalter* and holds only that, "oral agreements or *modifications* to a pension plan are contrary to the express provisions of ERISA." (Emphasis added.) *Id.* at 1292, 1296.

CONCLUSION

The Petition for Writ of Certiorari is untimely and must be denied. Further, the decision of the Circuit Court of Appeals does not conflict with any decisions of this Court or of other federal appeals courts. The decision of the Circuit Court does no violence to exclusive federal regulation of employee benefit plans and does not undermine the integrity of the Plan. Petitioners could easily have drafted the Medical Plan more precisely and are free to amend it to eliminate ambiguity.

Respectfully submitted,

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